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No. 90-1801

In the
Supreme Court of the United States

OCTOBER TERM, 1990

BOSTON TEACHERS UNION LOCAL 66,
PETITIONER,

v.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-RESPONDENTS,

AND

DANIEL R. BURKE, ET AL.,
DEFENDANTS-RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief in Opposition to a Petition for Writ of Certiorari of the Boston School Committee and the Superintendent of the Boston Public Schools

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Question Presented

In an earlier ruling in this case, the First Circuit mandated that remedial affirmative action goals for faculty and staff first adopted in 1975 were to expire when those goals were "adequately reached." In entering a Final Judgment, did the district court properly apply this mandate when it ruled that the affirmative action orders would automatically expire at the point at which a 3% seniority-based layoff would not substantially affect the proportions of minority staff in the teaching force?

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Respondents, Daniel R. Burke, *et al.*,[1] submit this brief in opposition to the Petition for a Writ of Certiorari submitted

[1] The respondents submitting this brief are the School Committee of the City of Boston (of which Daniel R. Burke was the president at the time of the decision challenged here) and the Superintendent of the Boston Public Schools. These respondents are referred to in the decisions below and in this brief as the "School Defendants."

by the petitioner, Boston Teachers Union, Local 66 (the "BTU" or the "Union").

Introduction

It is ironic that the Union invites this Court to use this case to establish principles governing the remedial power of district courts overseeing school desegregation cases. The remedy in this litigation is essentially over. Virtually all of the remedial orders in this case have been vacated. As the curtains close on this case, the BTU asks this Court to reopen them to review remedial decisions made, in some instances, fifteen years ago.

The particular order which the Union challenges came about as the district court attempted to end its jurisdiction in the case, recognizing the imperative stated most recently by this Court in *Board of Education* v. *Dowell*, 111 S. Ct. 630, 637 (1991), that school desegregation decrees "are not intended to operate in perpetuity." In 1987, the First Circuit reminded the district court that the faculty desegregation orders were not permanent orders and directed the district court to vacate those orders when their goals were "adequately reached." *Morgan* v. *Nucci*, 831 F.2d 313, 329 (1st Cir. 1987).

In 1990, the district court, seeking *sua sponte* to enter a final judgment terminating the court's jurisdiction, sought to craft an order which gave specific content to the First Circuit's mandate by articulating a "bright line" test: the affirmative action requirements of the order would terminate automatically when black and other minority staff had achieved sufficient seniority that a seniority-based layoff of 3% of the teaching force (approximately 132 teachers given the number of teachers employed in fiscal 1990 (Petition at 122a)) would not substantially affect the percentage of minority teachers. The First Circuit considered the district court's effort in this regard to constitute a "restrained" "fine-tuning" of its prior mandate and affirmed (Petition at 12a).

This pragmatic attempt to define a meaningful endpoint for a remedy that has operated for more than fifteen years presents no legal issue warranting review by this Court. In particular, this order does not raise the kind of issue regarding voluntary affirmative action plans that this Court addressed in such cases as *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986). To the extent any analogous issues arose in this litigation, they arose in the context of orders that were affirmed long ago and on which the parties to this case have acted in reliance for many years. The practice of this Court has been not to undertake collateral review of such issues. The principle of finality in litigation which this Court has repeatedly and consistently emphasized as vital to the effective functioning of the federal judiciary should counsel this Court to follow its practice in this case.

Statement of the Case

The complaint in this case was filed nearly 20 years ago in 1972. After a lengthy trial, the district court found that virtually every aspect of the Boston Public Schools was infected by racial segregation. Boston was found to operate a "dual" school system. *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass.), *aff'd sub nom. Morgan* v. *Kerrigan*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

The BTU in its statement of the case points to findings that the School Defendants had segregated teachers and administrators by race, assigning minority teachers to minority schools (Petition at 5-6). The BTU's statement is incomplete, however. The district court found not only that black staff had been segregated into predominantly black schools, but also that minority staff had been unconstitutionally excluded from teach-

ing and administrative positions altogether. *See id.* at 463-66. The district court concluded that this discriminatory pattern of hiring and promotions was a component of the dual school system and thus subject to remediation. The First Circuit affirmed in 1974, and this Court denied review in 1975. *Morgan* v. *Kerrigan*, 509 F.2d 580, 595-98 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

This liability finding established from the outset of this case that the underrepresentation of minority staff constituted part of the "unconstitutional condition." In framing the remedy, the district court required the School Defendants to increase the percentage of black teachers, ultimately to 25%. *Morgan* v. *Kerrigan*, 388 F. Supp. 581, 584-85 (D. Mass. 1975). Again, the First Circuit affirmed and this Court denied review. *Morgan* v. *Kerrigan*, 530 F.2d 431 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976).

Over the next five years, the school system made considerable progress in increasing the percentage of minority teaching and administrative staff, principally by hiring new employees. In 1981, however, a severe budget crisis forced the School Defendants to layoff many teachers. Since the collective bargaining agreement with the BTU provided that layoffs would be conducted in reverse order of seniority, the prospect of a massive reduction in force threatened to wipe out much of the progress toward the affirmative action goals. Accordingly, the district court ordered the School Defendants to conduct any layoff in a way which preserved the then existing percentages of black and other minority staff.[2] The School Defendants pro-

[2] Although the original liability and remedy rulings did not specifically address "other minority" personnel (i.e. Hispanics, Asians, Native Americans and other non-black racial/ethnic minorities), affirmative action requirements for other minorities were incorporated into the remedy in subsequent rulings. The 1981 orders regarding layoffs directed the maintenance of the then existing percentages of other minority staff and the First Circuit affirmed. *Morgan* v. *O'Bryant*, 671 F.2d 23 (1st Cir.), *cert. denied*, 459 U.S. 827 (1982). In 1985,

ceeded to reduce its staff in accordance with that order. The First Circuit affirmed and this Court denied review once again. *Morgan* v. *O'Bryant*, 671 F.2d 23 (1st Cir.), *cert. denied*, 459 U.S. 827 (1982).

In 1985, the district court entered "Final Orders" in which it addressed the affirmative action goals again. Finding that there had been little progress since 1981 toward the achievement of the remedial goals established in 1975, the district court required annual increments in the percentage of non-white staff until the ultimate goals were reached. *Morgan* v. *Nucci*, 620 F. Supp. 214, 216 (D. Mass. 1985). The First Circuit affirmed this aspect of the Final Orders, although it reminded the district court that the faculty orders were not permanent and were to be vacated when the affirmative action goals were "adequately reached." *Morgan* v. *Nucci*, 831 F.2d 313, 329 & n.25 (1st Cir. 1987). The BTU did not petition this Court for review.

In 1990, the district court *sua sponte* sought to conclude the case by entering a Final Judgment that would end the district court's jurisdiction. There was general agreement that virtually all of the vestiges of the dual school system had been eliminated.[3] The only significant exception was in the area of faculty and staff desegregation where the data indicated that some of the goals — principally the goal for black teachers systemwide — had not been attained.

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the district court noted that it had the authority to "enter orders with respect to the employment of Hispanic and other minority faculty no less than its jurisdiction to enter orders regarding the employment of black faculty." *Morgan* v. *Nucci*, 612 F. Supp. 1060, 1062 (D. Mass. 1985). The Union did not appeal from this order. The First Circuit concluded in 1987 that the propriety of a 10% affirmative action goal for other minority staff was part of the law of the case and the BTU did not seek review of that ruling from this Court. *Morgan* v. *Nucci*, 831 F.2d 313, 330 & n.26 (1st Cir. 1987).

[3] The First Circuit ruled that the student assignment remedy had been completed by 1985. *Morgan* v. *Nucci*, 831 F.2d at 317-26.

Given the general mandate of the First Circuit that the affirmative action orders should expire when their goals were "adequately reached," the district court sought to articulate a specific standard to measure that point. The district court considered this issue in the context of another budget crisis in which layoff notices had been sent to hundreds of teachers (Petition at 76a). Since under the law of the case the "unconstitutional condition" to which the affirmative action remedy had been directed was the exclusion of non-white teachers from the ranks of teachers and administrators, a lingering "vestige" of that condition was the disproportionate vulnerability of minority teachers to a seniority-based layoff. Thus, the district court found that in the particular circumstances presented, "seniority under applicable collective bargaining agreements would not now be a racially neutral standard for likely reductions of faculty and staff." (Petition at 19a.)

The pragmatic judgment made by the district court was that when minority staff obtain sufficient seniority that a seniority-based layoff of modest proportions — 3% of the total teaching force — would not substantially affect the percentage of minority staff, the vestiges of the constitutional violation would be sufficiently attenuated to warrant the vacation of the faculty orders. The First Circuit basically affirmed.[4] It viewed the 3% order as an appropriate "fine tuning" of the general requirement that the goals be "adequately reached." (Petition at 12a.)

In September, 1990, acting on a joint motion by plaintiffs and School Defendants, the district court amended the Final Judgment by expressly vacating all remedial orders not expressly set forth in the Final Judgment. *See infra* at 1a.

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[4] The court of appeals modified the district court's ruling in one respect. The district court had articulated the termination point in terms of a layoff of 3% "or more." The First Circuit ordered the words "or more" deleted to avoid the introduction of "uncertainty and open-endedness into an otherwise precise concept." (Petition at 12a.)

Reasons for Denying the Writ

This Court should deny certiorari, first, because the decision below presents no important issue which does not turn on the particular circumstances of this case. The decision of the district court challenged here by the BTU is the corollary of prior rulings that were either unchallenged or affirmed years ago by the First Circuit and that this Court has consistently declined to review. The only issue genuinely presented here is whether the district court properly applied the ruling of the First Circuit four years ago that upon the "adequate" achievement of affirmative action goals, the district court's remedial authority must come to an end. Resolution of this issue involved an exercise of remedial discretion in the particular circumstances of this case. The determination by this Court whether that discretion was abused in this case will furnish little guidance to other federal courts as they bring their school desegregation cases to meaningful conclusions.

Second, the BTU has pointed to no conflict between the decision below and any decision of this Court, of any other Court of Appeals or of the highest court of any state. Although the Union suggests that the First Circuit should have followed particular decisions from other circuits, all of the decisions cited in the Petition are readily distinguishable from and consistent with the decision below.

I. The Petition Does Not Raise an Important, Unsettled Issue of Federal Law.

The BTU invites this Court to view this case as an important test of the extent to which the remedial powers of a district court in a school desegregation case permit the "override" of the seniority provisions of a collective bargaining agreement

between a teachers union and the school board in order to achieve affirmative action goals incorporated into the desegregation remedy. *Cf. Wygant* v. *Jackson Board of Education*, 476 U.S. 267 (1986) (analyzing voluntary abrogation of "last hired, first fired" layoff rule to preserve percentage of minority teachers under Equal Protection principles). This issue was not raised in connection with the order challenged here, nor could it have been raised since the issue was resolved in this litigation years ago.

The principal contours of the affirmative action remedy in this case were established by 1981. By that time, the affirmative action target of 25% black teachers and administrators was established. *See Morgan* v. *Kerrigan*, 388 F. Supp. 581, 584 (D. Mass. 1975), *aff'd*, 530 F.2d 431 (1st Cir.), *cert. denied*, 426 U.S. 935 (1976). By that time as well, the First Circuit had ruled that the requirement that the affirmative action goals be reached superseded the "last hired, first fired" provisions of the collective bargaining agreement between the BTU and the School Defendants. *See Morgan* v. *O'Bryant*, 671 F.2d 23 (1st Cir. 1981), *cert. denied*, 459 U.S. 827 (1982). The First Circuit reaffirmed these remedial principles in 1987. *Morgan* v. *Nucci*, 831 F.2d 313, 327-32 (1st Cir. 1987). Accordingly, the legal underpinnings of the order challenged here were established in a series of decisions dating back to 1975 that were either affirmed or unchallenged on appeal. On those occasions on which the BTU has petitioned this Court for review, this Court has denied certiorari.

It is the practice of this Court not to review legal issues decided in earlier stages of cases before the Court, but to confine its attention to matters raised in the particular judgment or order that is the subject of the petition for certiorari. For example, in *Local 28, Sheet Metal Workers' International Association* v. *EEOC*, 478 U.S. 421 (1986), the defendant-union had been found to have discriminated on the basis of race

in 1975 and was ordered to attain a 29% non-white membership goal by July 1981. This order was affirmed on appeal. The defendant later failed to comply with the order and the district court ordered additional relief. On review of the additional relief, this Court concluded that the validity of the 29% affirmative action goal was not properly before the Court since it had been "established more than a decade ago and was twice affirmed by the Court of Appeals." *Id.* at 441.

The Court in *Local 28* relied on its earlier decision in *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976), a school desegregation case. There, the district court had made findings of intentional discrimination and had directed the implementation of a comprehensive desegregation remedy. Several years later, the school board challenged the district court's refusal to modify its remedial orders in light of subsequent events. Again, this Court ruled that the validity of the underlying remedy, established in earlier phases of the case, was not before the Court. *Id.* at 432.

The principles applied in these cases should control the disposition of the instant petition. As in those cases, the Union is challenging rulings regarding remedies for racial discrimination made during earlier phases of the litigation and either not the subject of challenge on appeal or affirmed by the court of appeals.

The Court in *Local 28* also relied on the well-established line of authority to the effect that a "contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." 478 U.S. at 441 n.21 (quoting *Maggio* v. *Zeitz*, 333 U.S. 56 (1948)). *See also United States* v. *Rylander*, 460 U.S. 752 (1983); *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). Thus, if the School Defendants had been charged with contempt of the earlier orders, they would not have been able to defend on the ground that the

underlying orders themselves exceeded the remedial powers of the district court.

Here, the School Defendants have substantially complied with the orders, taking action in reliance thereon for years. In 1981, for example, acting pursuant to the orders then challenged by the BTU, the School Defendants laid off a large number of teachers in such a fashion as to maintain the then existing percentages of black and other minority teachers. *See Morgan* v. *O'Bryant*, 671 F.2d at 24-25. The same logic that would bar the School Defendants from collaterally challenging the validity of the orders that they had failed to obey, should similarly bar another party from challenging the same orders after they had been obeyed.

That logic is the logic of finality. As this Court noted recently in *McCleskey* v. *Zant*, 111 S. Ct. 1454, 1469 (1991), "collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes." By invoking such cases as *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant*, (Petition at 18), the Union invites this Court to revisit issues that the Union has repeatedly litigated before in this case. Such an invitation should be declined.

Little remains if one puts aside those aspects of the BTU's petition that concern matters not properly before the Court. As the district court sought to enter a final judgment, it confronted two constraints. On the one hand, the school system faced the prospect of teacher layoffs prompted by budget reductions. A seniority-based layoff threatened to wipe out much of the progress toward achievement of the remedial affirmative action goals that had repeatedly been upheld by the First Circuit and to postpone indefinitely ultimate compliance with those goals. The law of the case directed the district court to take steps to prevent this result.

On the other hand, the decisions of both this Court and the First Circuit made it clear that an order perpetuating indefinitely

the percentage requirements was impermissible. The First Circuit had ruled that the orders would remain in effect only until the affirmative action goals had been "adequately reached," and the district court adopted the "3%" test as a pragmatic way to measure "adequacy." It is only this pragmatic judgment, affirmed by the First Circuit, that is properly before this Court.[5]

The challenge to this ruling does not present "an important question of federal law which has not been, but should be, settled by this Court." Supreme Court Rule 17.1(c). This Court has only recently rejected the notion that the district court's remedial authority evaporates at what the First Circuit referred to as the "magic moment when the ratio goals are satisfied for the first time." (Petition at 11a.) In *Board of Education* v. *Dowell*, 111 S. Ct. 630, 637 (1991), this Court noted that "[d]issolving a desegregation decree *after the local authorities have operated in compliance with it for a reasonable period of time* properly recognizes that 'necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.' " (Emphasis added.) The determination of what is a "reasonable period of time" is inherently a fact-bound determination, dependent upon the particular circumstances of the particular school district. As this Court has observed, "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann* v. *Board of Education*, 402 U.S. 1, 15 (1971).

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[5] The BTU notes that it disagrees with the district court's refusal to reduce the target percentage for blacks from 25% to slightly under 24%. (Petition at 14.) It makes no serious argument that the circumstances had changed sufficiently to warrant a departure from a goal that had been part of the remedy in this case since 1975, nor did it offer any material evidence that it was impracticable for the School Defendants to continue to strive toward that goal.

The extent to which the Union's challenge turns on facts peculiar to the particular circumstances of this case can be seen most clearly from the Union's principal argument. According to the BTU, the challenged order was improper because it is difficult to pinpoint when the 3% test is satisfied. (Petition at 14-17.) The Union contends that the seniority rules in the collective bargaining agreement are so complex and a layoff can be conducted in so many ways (depending, for example, on the program area or grade level targeted for reduction) that "it is impossible to envision the practical effect of a hypothetical layoff" on the percentage of minority staff. (Petition at 15.) Notwithstanding this impossibility, the BTU also claims that because of the lack of uniform distribution of minority staff it cannot envision an actual 3% layoff which does not alter the percentage of black and other minority teachers.

The First Circuit rejected this argument. Since 1981, the orders in this case have required layoffs to be conducted so as to preserve the then existing percentages of black and other minority staff. The First Circuit correctly concluded that predicting the effect of a seniority-based 3% layoff poses no greater challenge than the management of layoffs for the past decade under the "maintenance" model first adopted in 1981.

Even if the BTU were correct, however, that the 3% order is difficult to apply, the clarification or modification of such an order is surely a matter for the trial court to resolve in the first instance in the factual setting in which the order is to be applied. If the order is applied in practice to defer the termination point indefinitely, then the BTU will have an opportunity to seek review on a record that would permit a reviewing court to evaluate the application of the order. It makes no sense, however, for this Court to attempt to predict how the order will

be applied in practice at some point in the future under circumstances that have not yet even materialized.[6]

The BTU urges this Court to review an order largely on the basis of its speculation that the order will be misapplied. This case is plainly not a suitable one for this Court's discretionary review. It is fact-intensive and, at best, premature. Certiorari should be denied.

II. The Decision of the First Circuit Challenged Here Does Not Conflict with Any Decision of This Court or of Any Circuit Court.

The BTU claims that the challenged order contemplates the maintenance of a particular degree of racial balance after the achievement of "unitary status," and that this aspect of the order conflicts with other circuit court decisions which are said to require the termination of remedial jurisdiction immediately upon the achievement of "unitary status." The BTU's claims in this regard are spurious. Neither this Court nor the other circuits have adopted a "magic moment" theory of desegregation remedies whereby remedial orders lose their validity at the first moment of compliance. On the contrary, the consistent view of the circuit courts in desegregation cases is that a school system may be required to maintain desegregated conditions for a period of time to ensure the stability of the unitary system. *See, e.g., Pitts* v. *Freeman*, 887 F.2d 1438, 1445-46 (11th Cir. 1989), *cert. granted*, 59 U.S.L.W. 3561 (Feb. 19, 1991);[7]

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[6] Since the systemwide percentage of black teachers still falls short of the 25% goal, the 3% test is not yet even applicable.

[7] The Eleventh Circuit in *Pitts* not only followed the long established practice in the Fifth and Eleventh Circuits to require the maintenance of a desegregated system for a period of at least three years, but also rejected the notion that discrete remedial areas such as student assignments or faculty desegregation could become "unitary" while other areas remained subject to further remedi-

Quarles v. *Oxford Municipal Separate School District*, 868 F.2d 750, 752 (5th Cir. 1989); *Ross* v. *Houston Independent School District*, 699 F.2d 218, 227 (5th Cir. 1983). This Court in *Dowell* recognized the general applicability of this approach by expressing its approval of "[d]issolving a desegregation decree *after the local authorities have operated in compliance with it for a reasonable period of time*." 111 S. Ct. at 637 (emphasis added).

The BTU argues that these decisions require the maintenance of desegregation for a period *before* a finding of unitary status, not afterwards. The union misreads these cases, however. The procedure contemplated by those decisions is one of monitoring the achievement of the remedial goals to ensure that the elimination of the vestiges of segregation is not spurious or evanescent.

For example, in *Ross*, the district court found in 1980 that the school district was "unitary." 699 F.2d at 223. In connection with that finding, however, the district court retained jurisdiction for three more years and required the filing of reports in accordance with the procedures first set forth in *Youngblood* v. *Board of Public School Instruction*, 448 F.2d 770 (5th Cir. 1971) (*per curiam*). *Id.* at 227. The Fifth Circuit affirmed. *Accord*, *United States* v. *Overton*, 834 F.2d 1171, 1175 & n.12 (5th Cir. 1987).

Similarly, in *Pitts*, the Eleventh Circuit expressed the requirement for dismissal of the case in terms of maintaining

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ation. *See* 887 F.2d at 1446-47. It was on the latter aspect of the *Pitts* decision, as well as the requirement that the system remedy segregation resulting from demographic changes, that the school district in *Pitts* sought review from this Court.

This case does not present the issues on which review was sought in *Pitts*. The First Circuit expressly adopted the "incremental" approach to the completion of desegregation remedies in 1987. *Morgan* v. *Nucci*, 831 F.2d at 318-19. Indeed, the *Pitts* court expressly disagreed with *Morgan*, thus creating a conflict that likely influenced this Court's decision to review *Pitts*. Nothing in the present case turns on the resolution of this issue.

the *desegration* conditions for a period of years. 887 F.2d at 1446. In *Quarles*, the district court held in 1972 that the implementation of a remedial plan had eliminated all vestiges of segregation. *See* 868 F.2d at 752. The question whether sufficient time had passed arose in the context of a motion in 1987 by the school district to vacate the remedial order and dismiss the case.

In each of these cases, the issue was whether the school system had maintained a "unitary" system, i.e. a system that had eliminated the vestiges of discrimination, for a sufficient period to warrant not a finding of "unitary status" but rather dismissal of the litigation altogether. The mandate to the district court during the interim period is not further remediation but rather the retention of jurisdiction and the receipt of status reports. *E.g.*, *Youngblood*, 448 F.2d at 771; *Ross*, 699 F.2d at 227.

A further indication that the "maintenance" period comes after the achievement of the remedial goals is that at the end of the period the district court must give the plaintiffs an opportunity to show why the case should not be dismissed. *E.g.*, *Youngblood*, 448 F.2d at 771; *Ross*, 699 F.2d at 227; *Quarles*, 868 F.2d at 752. Before the completion of a desegregation remedy, this Court has made it quite clear that it is the defendant school district's burden to show that unitary status has been achieved. *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 538 (1979). The shifting of the burden to the plaintiff to demonstrate why the case should not be dismissed shows that the period during which jurisdiction is to be retained is "post-unitariness."[8]

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[8] The Fourth Circuit's decision in *Vaughns* v. *Board of Educ.*, 758 F.2d 983 (4th Cir. 1985), is not to the contrary. Although the Court observed that once "unitary status" is achieved, the district court may not order "*further* relief to counteract resegregation that does not result from the school system's intentionally discriminatory acts," *id.* at 988 (emphasis added), it had no occasion to consider whether some period of maintenance should be required after the

It follows from the foregoing that the decision of the First Circuit approving a relatively brief period of maintenance before the faculty and staff desegregation orders expire by their terms is entirely consistent with the practice in other circuits, a practice which this Court recognized in its recent decision in *Dowell*. The Union's claim of a conflict among the circuit courts on this subject is entirely fanciful.[9]

achievement of unitary status. The principal holding of *Vaughns* was that the school board had not demonstrated that the remedy was complete.

The Fourth Circuit's approach to the termination of desegregation decrees is consistent with that of the Fifth and Eleventh Circuits. *Riddick* v. *School Board*, 784 F.2d 521, 530 (4th Cir.), *cert. denied*, 479 U.S. 938 (1986) (district court to retain jurisdiction "to make certain" the remedial goals had been accomplished).

[9] The other conflicts suggested by the BTU are no more substantial. In *Oliver* v. *Kalamazoo Bd. of Educ.*, 706 F.2d 757 (6th Cir. 1983). The Sixth Circuit vacated an affirmative action order entered nine years after the original liability determination abrogated a collectively bargained seniority provision without a finding that such an order was necessary to vindicate the rights of the plaintiffs. In this case, the faculty desegregation order, including the 25% black goal, was part of the original remedy. See also *Arthur* v. *Nyquist*, 712 F.2d 816 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984).

Oliver might arguably be relevant if the propriety of the faculty desegregation orders in this case were properly before this Court, although even if that were the case, the *Oliver* court cited the First Circuit's decision upholding the remedy in this case without any suggestion that it disagreed with that decision. See 706 F.2d at 762. As the earlier discussion has demonstrated, however, this Court faces no question regarding the propriety of the faculty desegregation orders as an original matter. Accordingly, *Oliver* is not relevant.

The BTU's citation of of *Keyes* v. *School Dist. No. 1*, 895 F.2d 659, 665 (10th Cir. 1990) (Petition at 24), adds nothing to its argument. Nowhere in that opinion is there any suggestion that the kind of "fine-tuning" approved by the First Circuit in this case is inconsistent with the remedial principles applied in desegregation cases. Indeed, the Tenth Circuit approved a order requiring the school district to employ an affirmative action plan, with "yearly timetables and a reasonable target date for the attainment of the affirmative action goals." *Id.* at 668-69 & n.5.

Conclusion

For the foregoing reasons, the BTU's petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

TALLULAH MORGAN, ET AL.,
Plaintiffs,

v. CIVIL ACTION NO. 72-911-G

DANIEL R. BURKE, ET AL.,
Defendants.

AMENDED FINAL JUDGMENT

GARRITY, J.

After consideration of the Joint motion for Modification of Final Judgment submitted by Plaintiffs and School Defendants, it is ORDERED and ADJUDGED that the Final Judgment of this Court dated May 31, 1990 is hereby amended by adding after paragraph 4 the following:

Reports on Staffing

(5) shall continue the October and March reports on staffing so long as paragraph (3) is in effect, and shall include in the March report data showing the make-up of the faculties at the three examination schools;

Vacation of Outside Orders

(6) all orders previously entered in this action and not specifically set forth in this Final Judgment are hereby VACATED.

/s/ W. Arthur Garrity, Jr.
United States District Judge
9/19/90